



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

NOV 19 2009

Mr. David Katsel, Treasurer  
Tim Bee for Congress  
P.O. Box 31985  
Tucson, AZ 85751

RE: MUR 5996  
Tim Bee for Congress and David Katsel,  
in his official capacity as treasurer

Dear Mr. Katsel:

On April 18, 2008, the Federal Election Commission notified Tim Bee for Congress and you, in your official capacity as treasurer ("the Committee"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to the Committee at that time.

Upon further review of the allegations contained in the complaint and other available information, including your response to the complaint, the Commission on October 20, 2009, voted to dismiss the allegation that the Committee and Education Finance Reform Group coordinated an advertisement referencing Tim Bee. Accordingly, the Commission closed its file in this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003).

If you have any questions, please contact Dawn M. Odrowski, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Sid Rocke".

Sid Rocke  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENT:** Tim Bee for Congress and David Katsel, MUR: 5996  
4 in his official capacity as treasurer  
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6 **I. INTRODUCTION**

7 This matter was generated by a complaint filed with the Federal Election Commission  
8 ("the Commission") by the Democratic Congressional Campaign Committee. The complaint  
9 alleges that a 2008 television advertisement financed by Education Finance Reform Group  
10 ("EFRG"), a group formed by local Arizona school districts to lobby on state education issues,  
11 expressly advocated the election of Tim Bee, a candidate for the House in Arizona's 8<sup>th</sup>  
12 Congressional District. Complainant maintains that the advertisement constituted an excessive  
13 and prohibited in-kind contribution to Bee's principal campaign committee, Tim Bee for  
14 Congress ("the Committee"), based on its belief that EFRG was a corporation and that the ad  
15 was coordinated between EFRG and Bee.<sup>1</sup>

16 As discussed below, the Commission exercises its prosecutorial discretion and dismisses  
17 the coordinated communication allegations as to Tim Bee and the Committee. *See Heckler v.*  
18 *Chaney*, 470 U.S. 821, 831 (1985).

19 **II. FACTUAL AND LEGAL ANALYSIS**

20 **A. Factual Summary**

21 Information obtained by the Commission indicates that EFRG is an unincorporated group  
22 of 16 local school districts formed through an inter-governmental agreement to lobby the  
23 Arizona legislature for changes in teacher performance pay. *See also* Daniel Scarpinato, *Tax*

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<sup>1</sup> The complaint makes its allegations against "an unnamed organization" but cites to a newspaper article in a footnote that identified the organization as EFRG. Information obtained by the Commission confirms that EFRG financed the ad.

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1 *Dollars Fund 30-Second TV Spot Lauding Bee*, Arizona Daily Star (April 8, 2008), available at  
2 2008 WLNR 7328636 ("Scarpinato, *Tax Dollars*"). The information also indicates that a  
3 primary outcome of the two-year-old group's efforts was to help pass Senate Bill 1488,  
4 legislation sponsored by state senator Tim Bee, who was a sitting state senator when he became a  
5 candidate in the primary election for the U.S. House of Representatives.<sup>2</sup> Senate Bill 1488  
6 concerned a Teacher Performance Pay Program. *Id.* Following passage of the legislation in the  
7 state senate on March 20, 2008, EFRG began airing an ad on or around March 28, 2008 on  
8 selected cable television stations in the 8<sup>th</sup> Congressional District. *Scarpinato, Tax Dollars*;  
9 Complaint at 2. According to the Arizona State Legislature website, at the time the ad aired,  
10 Senate Bill 1488 was pending in two state house committees.

11 A transcript of the ad (hereinafter "the ad" or *Thank You*), including a description  
12 of the video, is as follows:  
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<u>Audio</u>	<u>Visual</u>
Thank you, Senator Bee	Film footage of Tom Murphy, board member, Sahuarita School District
Senator Bee, I would like to thank you as a parent for your continued support of education.	Film footage of Kris Ham, parent, Sahuarita School District
Thank you, Senator Bee, for supporting students in southern Arizona.	Film footage of Richard Connet, President, Vail Education Association
Narrator: Senate Bill 1488 sponsored by Senate President Tim Bee . . .	Footage of Bee apparently taped from television with 3/4/08 date in corner of frame and chyron reading: "SB 1488 schools; teacher performance pay programs," "Senate appropriations"

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<sup>2</sup> The Arizona primary was held on September 2, 2008. After notifying the Commission in September 2007 that he was exploring a run for the House and designating an exploratory committee, Bee filed a Statement of Candidacy and a Statement of Organization on January 25, 2008. News articles appearing at the time the ad began airing presumed, correctly, that Bee would face the incumbent Democrat, Gabrielle Giffords, in the general election.

... will level the playing field so that all teachers in southern Arizona will receive greater pay for performance.	Footage of Bee outdoors in a discussion with several people, including individuals featured in the ad
Narrator: The Tucson Citizen stated "Bee's bill, supported by school districts, parents, teachers, and advocates of education would allow all districts to participate."	Excerpts quoting from two newspaper articles published in "The Tucson Citizen"
Narrator: Tim Bee: Fighting for fairness for southern Arizona.	Picture of Tim Bee next to text: "Tim Bee" "Senate Bill 1488" "Fighting for Fairness for Southern Arizona"
Thank you, Senator Bee.	Film footage of two female elementary school-aged children

Following public attention about the financing of what appeared to be a political ad with taxpayer dollars, the cable company reportedly pulled the ad on or about April 8, in part so that the ad sponsor could be identified. Scarpinato, *Tax Dollars*. The following day, EFRG announced that it had cancelled the ad because a state house committee had approved the bill and because the ad was being perceived as a move against the Democratic incumbent in the 8<sup>th</sup> Congressional District. Scarpinato, *Schools Group Pulls Ad That Supports Bee*, Arizona Daily Star (April 10, 2008), available at <http://www.azstarnet.com/sn/printDS/233730> ("Scarpinato, *Schools Group*"). Hours later, Bee called for the ad to be removed in a public statement. *Id.* An unspecified portion of the \$16,000 EFRG reportedly paid for the ad was expected to be refunded. *Id.*

## B. Analysis

### 1. Coordination Allegations

Under the Federal Election Campaign Act of 1971, as amended ("the Act"), an expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents" constitutes an

in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(i). A communication is coordinated with a candidate, a candidate's authorized committee, or agent of either when the communication satisfies the three-pronged test set forth in 11 C.F.R. § 109.21(a): (1) the communication is paid for by a person other than a candidate, the candidate, committee, or an agent of either; (2) the communication satisfies at least one of the content standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of the conduct standards set forth in 11 C.F.R. § 109.21(d).

The payment for a coordinated communication is an in-kind contribution to the candidate or his or her authorized committee with whom it was coordinated. See 11 C.F.R. § 109.21(b)(1). Further, the in-kind contribution will be considered received and accepted by the candidate or his or her authorized committee and must be reported as an expenditure made by the candidate or his or her authorized committee under certain circumstances. See 11 C.F.R. § 109.21(b)(1) and (2).

**a. The Payment Prong**

EFRG paid for *Thank You*. Therefore, the payment prong of 11 C.F.R. § 109.21(a)(1) is satisfied.

**b. The Content Prong**

At all times relevant to this matter, the content prong was satisfied if the communication at issue met at least one of four content standards. Only two apply here: (1) a public communication that republished, disseminated, or distributed, in whole or part, a candidate's campaign materials; and (2) a public communication that contained express advocacy. See 11 C.F.R. § 109.21(c)(2) and (3). Neither of the other two content standards – electioneering communications and 90-day pre-election public communications – is implicated because the ad

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1 aired more than five months before the September primary election, well outside the time frames  
2 covered by those standards. See 2 U.S.C. § 109.21(c)(1) and (4).<sup>3</sup>

3 (i). Express Advocacy

4 The complaint contends that *Thank You* expressly advocated Tim Bee's election pursuant  
5 to 11 C.F.R. § 100.22(b), which if true, would satisfy the content prong of the coordinated  
6 communication rules.

7 Section 11 C.F.R. § 100.22(b) provides that "expressly advocating" means any  
8 communication that—

9 When taken as a whole and with limited reference to external events,  
10 such as the proximity to the election, could only be interpreted by a reasonable  
11 person as containing advocacy of the election or defeat of one or more clearly identified  
12 candidate(s) because—

13 (1) The electoral portion of the communication is unmistakable, unambiguous,  
14 and suggestive of only one meaning; and

15 (2) Reasonable minds could not differ as to whether it encourages actions to elect  
16 or defeat one or more clearly identified candidate(s) or encourages  
17 some other kind of action.

18 The complaint relies on a number of external events to support its assertion that a  
19 reasonable person could not interpret the ad as anything other than advocating the election or  
20 defeat of a clearly identified Federal candidate. It asserts that the ad aired "in the midst of a  
21 heated [congressional] campaign" in the 8<sup>th</sup> Congressional District and argues that it cannot  
22 reasonably be viewed as an effort to thank Bee for his work on SB 1488 because the bill had  
23 already passed the state senate when the ad was broadcast. Complaint at 2. It also states that an

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<sup>3</sup> The U.S. District Court for the District of Columbia held that the Commission's revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. See *Shays v. F.E.C.*, 508 F. Supp. 2d 10 (D.D.C. Sept. 12, 2007) (granting in part and denying in part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the current standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. See *Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. 2008).

individual who appeared in the ad admitted to a reporter that “[w]e all knew it was going to be used also for his run against [the Democratic incumbent] Giffords.” *Id.*, citing to Scarpinato, *Tax Dollars*. The individual quoted by the reporter was a teacher in one of the school districts participating in EFRG.

Respondents deny that the ad expressly advocated Bee’s election to Congress and assert that the ad advocated an issue. Committee Response at 2.

*Thank You* may be reasonably interpreted as having a meaning other than expressly advocating Bee’s election to federal office. No candidacy or federal election is mentioned in the ad. It does not explicitly praise Bee’s character, qualifications, or accomplishments in a context that has no other reasonable meaning than to encourage actions to elect or defeat Bee. *See e.g.*, Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures: Explanation and Justification, 60 Fed. Reg. 35292, 35295 (July 6, 1995). The single issue at the center of *Thank You* was legislative in nature, focusing on education, and more specifically, SB 1488, a bill that Bee had sponsored in the state senate that had an integral connection to the school districts who participated in EFRG. Moreover, the ad began airing soon after the successful state senate vote on the legislation and at the same time state house committees were considering it, well before Arizona’s September primary and the November general elections.

Based on these facts, *Thank You* does not contain an “electoral portion” that is “unmistakable, unambiguous, and suggestive of only one meaning;” rather, reasonable minds could differ as to whether the ad encourages electoral or some other action. *See*, 11 C.F.R. § 100.22(b). Therefore, we conclude that *Thank You* does not expressly advocate Tim Bee’s election to Congress. *See* MUR 5779/5805 (City of Santa Clarita)(banners thanking a U.S. Representative for a specific piece of legislation did not expressly advocate his election because

they could be reasonably interpreted as messages advocating passage of the legislation and thanking the legislator for sponsoring it).

**(ii). Republication**

An examination of the *Thank You* video found on the internet raises an issue as to whether the ad satisfied the republication standard of the content prong in 11 C.F.R. § 109.21(c)(2). A frame towards the end of the 30-second ad that appears on screen for two seconds contained a photo of Bee next to text that read, "Tim Bee, Senate Bill 1488," and above the "Fighting for Fairness for Southern Arizona" phrase. As noted, *supra*, the Bee photo in *Thank You* is identical to a "head shot" photo of Bee that appeared on the home page of the Committee's website. The photo was also available as a high resolution download in the "Media Kit" section of the site. Although we do not have any information about whether EFRG obtained the photo from the campaign website, given the website's display of the photo and its invitation to download it, it is possible that the Bee photo used in *Thank You* was originally generated by the Committee.

The content standard set forth in 11 C.F.R. § 109.21(c)(2), includes, subject to several exceptions not applicable in this matter, the republication of campaign material, in whole or in part, prepared by a candidate or his or her authorized committee in a public communication. Public communications include television advertisements that are disseminated via broadcast, cable or satellite. *See*, 2 U.S.C. § 431(22).

Previously, the Commission dismissed a complaint involving the alleged republication of campaign photographs in third-party mailers. *See* MUR 5743 (Betty Sutton for Congress/Emily's List). *See also* Statement of Reasons in MUR 5743 (Commissioners Weintraub and Von Spakovsky) (concluding that the downloading of photos from a candidate's unrestricted website

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1 for incidental use in a mailer independently created and financed by a third party does not  
2 constitute republication and is not an in-kind contribution).

3 In this matter, the "head shot" photo, which was identical to a "head shot" photo  
4 available for public download on the Tim Bee for Congress Internet website, appeared briefly  
5 toward the end of a 30 second television advertisement. The Commission was unable to agree  
6 on whether the use of the "head shot" in this matter constituted republication; however, because  
7 the "head shot" photo was publicly available for download at no charge from the campaign's  
8 website and was a small portion of the television advertisement at issue, the Commission voted  
9 to exercise its prosecutorial discretion and dismiss the allegation that EFRG made or Tim Bee for  
10 Congress accepted an excessive or prohibited contribution in the form of a coordinated  
11 communication.<sup>4</sup> See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

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<sup>4</sup> Because the Commission voted to dismiss the allegation with respect to the content prong, there is no need to reach the final prong of the test, the conduct prong.